Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

MATTHEW G. BROWN,
Petitioner,

v.

SPECTACOR MANAGEMENT GROUP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GARY GREEN
COUNSEL OF RECORD

ROBERT A. DAVITCH
SIDKOFF, PINCUS & GREEN, P.C.
1101 MARKET STREET
SUITE 2700
PHILADELPHIA, PA 19107
(215) 574-0600

ATTORNEYS FOR PETITIONER

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

1. Where a plaintiff files an action in federal court based on diversity jurisdiction and the plaintiff's claim is for less than the jurisdictional amount in controversy, and the defendant objects to subject matter jurisdiction in his answer to the complaint and by way of a subsequent motion, can the plaintiff's jurisdictionally deficient complaint be "saved" or "rescued" by a compulsory counterclaim filed by the defendant that itself seeks damages that exceed the jurisdictional amount in controversy?

2. Where a plaintiff files an action in federal court based on diversity jurisdiction and the plaintiff's complaint does not in good faith satisfy the amount in controversy requirement, and the defendant objects to jurisdiction in his answer pursuant to Fed.R.Civ.P. 12(b) and subsequently in a motion filed under Fed.R.Civ.P. 11, and the district court fails to decide the jurisdictional issue raised by the defendant, is the court of appeals permitted to find that the defendant's compulsory counterclaim which, standing alone, seeks damages that exceed the jurisdictional amount in controversy, is adequate to confer jurisdiction over the entire proceeding?

3. Where a plaintiff files an action in federal court based on diversity jurisdiction, and the record reveals that the plaintiff manufactured a claim for more than the jurisdictional amount in controversy in order to get into federal court, is the defendant required to file a motion to dismiss the complaint under Fed.R.Civ.P. 12(b) in order to have the plaintiff's complaint dismissed for lack of jurisdiction, or to have the action dismissed is it sufficient for the defendant to object to jurisdiction in his answer pursuant to Rule 12(b) and file, alternatively, a compulsory counterclaim which would be pursued in the event the jurisdictional objection is overruled?

4. Where Fed.R.Civ.P. 12(b) expressly gives a defendant in a federal court proceeding the option of objecting to diversity jurisdiction either in his answer or by way of a motion to dismiss, and a defendant elects to object to jurisdiction in his answer and to not file a motion to dismiss, and the court fails to rule on the jurisdictional objection, can the defendant be found to have consented to jurisdiction, or to have waived his jurisdictional objection by filing, with the answer, a compulsory counterclaim which seeks damages that exceed the jurisdictional amount in controversy?

5. Where a plaintiff files an action in federal court based on diversity jurisdiction and it is undisputed that the plaintiff's claim for damages does not satisfy the amount in controversy for diversity jurisdiction, and the defendant objects to jurisdiction in his answer to the complaint and in a subsequent motion, and the district court fails to decide the defendant's jurisdictional objection, should the case be remanded to the district court to consider the jurisdictional issue?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are the same parties appearing before this Court. Petitioner is Matthew G. Brown, defendant-appellant in the court below, and Respondent is Spectacor Management Group, plaintiff-appellee in the court below.

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ORDERS AND OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Pennsylvania, dated September 27, 1996, is reproduced in Petitioner's appendix at pages A32-63. The final judgment of the United States District Court for the Eastern District of Pennsylvania, entered on October 15, 1996, is reproduced in the appendix at pages A31-32. The opinion of the United States Court of Appeals for the Third Circuit filed on November 24, 1997 is reproduced in the appendix at pages A5-30. The judgment of the United States Court of Appeals for the Third Circuit dated November 24, 1997, which affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania, is reproduced in the appendix at pages A3-4 The order of the United States Court of Appeals for the Third Circuit dated December 16, 1997, denying Petitioner's petition for rehearing, is reproduced in the appendix at pages A1-2. There are no official citations to any of these orders or opinions.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit which is sought to be reviewed was entered on November 24, 1997 (A 3-4).[1] Petitioner filed a timely petition for rehearing with the Third Circuit on December 8, 1997. On December 16, 1997, the Third Circuit entered an order denying the petition for rehearing (A 1-2). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] References to the appendix hereto shall be cited as "A ___", with the page numbers following the designation "A".

STATEMENT OF THE CASE

Overview

This is a case where Respondent, Spectacor Management Group ("Spectacor"), received notice that it would be sued by Petitioner, Matthew G. Brown ("Brown"), its former employee, in a state court action which Spectacor knew could not be removed to federal court. Preferring to be in federal court, Spectacor raced to the federal courthouse and filed a sham diversity action against Brown in which it made itself the plaintiff. Spectacor's complaint did not satisfy the "good faith" test for the jurisdictional amount in controversy, and Brown objected to federal jurisdiction in his answer to the complaint. Brown also filed, simultaneously with his answer, a compulsory counterclaim against Spectacor pursuant to Fed.R.Civ.P. 13. After the parties had engaged in discovery, Brown filed a motion for sanctions against Spectacor under Fed.R.Civ.P. 11 in which he showed additional reasons why there never was federal jurisdiction, and sought dismissal of the action. The district court denied Brown's Rule 11 motion, and the case proceeded to trial.

The district court never decided the jurisdictional question, even though it was raised by Brown in his answer and again in the Rule 11 motion. Following a bench trial, the district court entered judgment in favor of Brown, but in an amount that was substantially less than the amount of his counterclaim. On appeal to the Third Circuit, Brown again raised the jurisdictional issue, arguing that the district court did not have subject matter jurisdiction, and therefore, that the case should be remanded to state court for further proceedings.

The Third Circuit, in a split decision which focused solely on the jurisdictional issue, departed from the

controlling authority of this Court as well as the decisions of other courts of appeal when it ruled that because Brown filed a compulsory counterclaim against Spectacor that sought damages in excess of the $50,000 jurisdictional limit, and elected not to file a motion to dismiss under Fed.R.Civ.P. 12(b), Brown's counterclaim in effect "rescued" what might otherwise have been a jurisdictionally deficient complaint filed by Spectacor. The Third Circuit issued this ruling even though Brown unquestionably complied with Rule 12(b) by objecting to jurisdiction in his answer to Spectacor's complaint; Rule 12(b) by its very terms gave Brown "the option" of asserting the defense of lack of subject matter jurisdiction *either* in his answer *or* by way of a motion to dismiss. In either case, the district court was obliged to consider the jurisdictional challenge under Fed.R.Civ.P. 12(h)(3). Brown chose the former option, and filed an answer challenging jurisdiction as well as a compulsory counterclaim which he intended to pursue only if the jurisdictional objection was overruled.

The Third Circuit panel majority's holding overlooked or misapprehended the well-settled authority of this Court which stands for the proposition that federal jurisdiction is to be determined solely from the "good faith" allegations of the *plaintiff's complaint*. In this case, Brown proved to a legal certainty that Spectacor's complaint against him, at the time it was filed, did not satisfy the amount in controversy requirement for diversity jurisdiction. Indeed, Spectacor conceded during the case that when it filed its action against Brown, it had no claim against him for *any* damages, let alone a claim that surpassed the jurisdictional threshold of $50,000. Nevertheless, the Third Circuit concluded that the filing by Brown of a counterclaim that, in itself, sought damages that exceeded the $50,000 jurisdictional limit was sufficient to confer federal jurisdiction over the entire proceeding, regardless of whether Spectacor's complaint was

a contrivance designed to force the entire litigation in federal court. As it will be shown, the Third Circuit's ruling is at odds with the controlling authority of this Court as well as the Federal Rules of Civil Procedure. The Third Circuit suggested that if Brown had filed a motion to dismiss under Fed.R.Civ.P. 12(b) rather than objecting to jurisdiction in his answer, the result would have been different – even if the district court denied the motion to dismiss, in which case Brown would have been required to file his counterclaim anyway.

The Third Circuit dissent would have held that even where a compulsory counterclaim, standing alone, exceeds the jurisdictional amount in controversy, it cannot "save" a plaintiff's complaint which, standing alone, does not in good faith assert a claim for damages that exceeds the amount in controversy. The dissent reasoned that under the controlling authority, the presence or absence of diversity jurisdiction is to be determined from the standpoint of the *plaintiff's complaint* (particularly where as here the defendant challenges subject matter jurisdiction in his answer), and that since there was "a serious question" as to whether Spectacor had a good faith basis for bringing an action against Brown in federal court and the district court had never decided the jurisdictional issue, the appropriate remedy was to remand the case to the district court "for a thorough consideration of the jurisdictional issue".

Procedural History and Summary of the Proceedings Below

On October 1, 1993, Spectacor initiated what purported to be a diversity action against Brown, to recoup severance payments and medical benefits it had allegedly "advanced" to Brown (A 64-67). At the time the case was filed, federal courts had jurisdiction where there was

complete diversity among the parties and the amount in controversy exceeded $50,000, exclusive of costs and interest. *See*, 28 U.S.C. § 1332(a).[2] Spectacor alleged in its complaint that it had "advanced" $42,501 in severance pay and $4,921 in medical benefits to Brown (A 65-66). These sums, when added together, amounted to only $47,422 (A 65-66). In order to reach the jurisdictional threshold of more than $50,000, Spectacor pleaded further in its complaint that it "incurred payroll tax liabilities on the salary advances totaling at least $3,287.21" (A 66).

Brown knew that Spectacor's complaint did not satisfy the amount in controversy requirement because Spectacor was not entitled to recoup these "payroll tax liabilities" *from Brown*. Since these "payroll tax liabilities" were nothing more than normal payroll tax obligations imposed on employers, they were not paid *to* Brown or for his benefit, and assuming *arguendo* that Spectacor had a valid claim to recover them, its sole remedy would have been to make a claim for a refund *to the IRS*. *See*, 26 CFR Ch.1 (4/1/96), Internal Revenue Service, §§ 31.3111-4, 31.3604(a)(2), 301.6404-2. Accordingly, it was obvious that Spectacor included these "payroll tax liabilities"in its complaint as an element of damages as a contrivance to clear the jurisdictional hurdle, and get into federal court.

Brown filed a timely answer to Spectacor's complaint in which he repeatedly challenged the district court's subject matter jurisdiction (A 68-74). *See*, Fed.R.Civ.P. 12(b) (defendant may raise lack of subject matter jurisdiction *either* in his answer *or* by way of a motion to dismiss). For example, in his answer, Brown averred that "[t]he Court

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[2] The amount in controversy for diversity jurisdiction has since been increased to $75,000.

lacks jurisdiction over the subject matter in that the amount in controversy does not exceed $50,000" and that "the items alleged by [Spectacor] to reach the $50,000 threshold are not compensable damages" (A 68, 72). Brown's answer specifically denied that the payroll tax liability was a compensable item of damages to Spectacor, and it alleged also that Spectacor's complaint "was filed in bad faith to harass [Brown] after [he] put [Spectacor] on notice that he intended to sue it..." (A 71, 74). Contemporaneously with the filing of his answer, Brown filed a compulsory counterclaim against Spectacor pursuant to Fed.R.Civ.P. 13, in which he sought damages for breach of contract in excess of $1,000,000 (A 74-77). The compulsory counterclaim was filed to preserve Brown's claims against Spectacor in the event the district court overruled his jurisdictional objection.[3]

After discovery was undertaken, the record revealed that not only was Spectacor's allegation with respect to the "payroll tax liability" a sham devised to overcome the $50,000 federal jurisdictional hurdle, but more significant, that Spectacor's *entire* claim against Brown – including its claim for recoupment of the $47,422 in severance pay and medical benefits – was a contrivance manufactured by Spectacor for the sole ulterior purpose of having *Brown's* large claim against *Spectacor* – which Spectacor knew Brown was about to file in *state court* – litigated in *federal court*

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Brown could have, but elected not to file a motion to dismiss for lack of jurisdiction under Fed.R.Civ.P. 12(b). By challenging jurisdiction in his answer, Brown followed Rule 12(b), which gave him the option to assert this defense in his answer, and he expected that the district court would rule on his objection, as it was obliged to. *See*, Fed.R.Civ.P.12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). However, as the Third Circuit dissent noted, the district court never decided the jurisdictional question.

(with Brown as a *counterclaimant*), where Spectacor admitted it wanted to be. This revelation came to light when Brown filed a motion for summary judgment on his counterclaim in which he demonstrated that there was no dispute that Spectacor owed him a bonus of $50,000 as well as $15,692 in vacation pay (A 82,88-93). In its response to Brown's motion for summary judgment, Spectacor, in an effort to defeat the motion, admitted that well before it had sued Brown in federal court to recover $50,708 in damages (including the payroll taxes), it had paid *itself* the same $50,708 from the $50,000 bonus and $15,692 in accrued vacation pay it acknowledged owing Brown (A 95-101). In other words, Spectacor admitted to knowing before it sued Brown that it was holding $65,692 of Brown's money, and it acknowledged using that money to pay *itself*, as a "set-off" against the $50,708 it later sought to recover from Brown in the sham complaint it filed against him (A 99-101). Accordingly, Spectacor's answer to Brown's summary judgment motion effectively conceded that at the time it sued Brown, it knew it had *no claim* against Brown for *any* damages, let alone a claim for more than $50,000. Indeed, at the time Spectacor's complaint was filed and under its own theory, *it* owed *Brown* almost $15,000 (since Brown's money that Spectacor had taken as a "set off" exceeded the amount it later sued Brown for by about $15,000).[4]

As a result of Spectacor's telling admission that it had manufactured diversity jurisdiction by alleging a supposed debt it knew was already paid by Brown, on August 26, 1994 – more than two years before trial – Brown filed a motion for

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[4] The panel majority of the Third Circuit correctly noted that "Spectacor maintained that it retained the money that it owed Brown as a set off against payments it had made to Brown that he was obligated to repay" (A 8).

sanctions under Fed.R.Civ.P. 11 (A 102-145). In that motion, Brown offered irrefutable evidence of Spectacor's bad faith invocation of federal jurisdiction (A 118-136, 138-145). Significantly, in its response to Brown's Rule 11 motion, Spectacor did not (and could not) dispute that it believed at the time it sued Brown in federal court for $50,708 in damages that Brown actually owed it nothing (A 146-153). Spectacor even acknowledged that it had a motive for manufacturing federal jurisdiction and a claim for damages against Brown for more than $50,000, when it openly revealed in its answer to Brown's Rule 11 motion that it had sued Brown in *federal court* only because Brown had put it on notice that he was about to sue it in *state court* for the same damages Brown later sought against Spectacor in his compulsory counterclaim filed in the federal court action (A 148-150). In a remarkable display of candor, Spectacor admitted further in its response answer to the Rule 11 motion that it had chosen *federal court* as the forum for bringing its preemptive strike suit against Brown because it believed Brown would have a better chance of winning in *state court*, and that it knew if Brown sued it first, in *state court*, it would not have been able to remove the case to *federal court* under 28 U.S.C.§ 1441(b) because Brown was a citizen of Pennsylvania (A 151-153).[5]

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[5] In its opposition to Brown's Rule 11 motion, Spectacor specifically acknowledged that: "the Philadelphia Court of Common Pleas is a more favorable forum for an employee in a financial dispute with his employer;" it "would prefer to be in [federal court]; and it was aware when it filed its complaint against Brown in federal court that if Brown had "sued first in state court, [Spectacor], as a resident defendant, would not have been able to remove the case despite diversity of citizenship..." (A 153).

As a remedy for Spectacor's Rule 11 violation, Brown sought *dismissal* of Spectacor's complaint *for lack of subject matter jurisdiction* (A 103, 105, 116-118, 125-126, 129-130). Time and time again in his Rule 11 motion, Brown brought to the district court's attention the fact that it did *not* have subject matter jurisdiction because Spectacor admitted to believing at the time it sued Brown that it had no claim against him *at all*, let alone a claim that exceeded $50,000 (A 103, 105, 116-118, 125-126, 129-130).[6]

Nevertheless, on February 14, 1995, the district court entered an order denying Brown's Rule 11 motion (A 154-155). The district court ruled, without elaboration, that Spectacor did not file the action "solely to harass" Brown, but it did acknowledge that Spectacor brought the case in federal court "in order to obtain what it perceive[d] to be the more amenable forum" (A 155). The district court, however, did *not* decide the question of whether it had subject matter jurisdiction, even though Brown objected to jurisdiction in his answer and again in the Rule 11 motion (A 154-155).

The issue of federal jurisdiction surfaced again at trial when Spectacor's counsel stipulated that before Spectacor filed its complaint, it had paid itself the entire amount it later claimed against Brown in its complaint and that, in fact, at the time the complaint had been filed, Spectacor actually owed Brown the difference between the set-off amount Spectacor

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6 For example, Brown argued in his Rule 11 motion that Spectacor "manufactured a $50,000.00 claim in order to sue Brown in Federal Court", that "any reasonable pre-filing investigation by counsel would have revealed that there was no federal jurisdiction", and that "when [Spectacor] sued Brown, it and its counsel must have believed that [Spectacor] had no claim against Brown, or if it did have a claim, its value was nowhere close to $50,000.00" (A 125, 130).

took and Brown's funds that it had retained (A 156-158). The district court, however, continued to ignore the jurisdictional issue and the trial proceeded to its conclusion. Significantly, the district court awarded Brown the difference between what Spectacor admittedly *owed* him and the amount Spectacor had claimed *from* him in its complaint (A 46-47 60-63). This ruling simply confirmed what Brown had alleged all along, *i.e.*, that Spectacor's complaint was nothing more than a sham designed to create federal jurisdiction.

On appeal to the Third Circuit, Brown again raised the jurisdictional issue, contending that since the district court lacked subject matter jurisdiction, he should be given the right to re-file his counterclaim as a complaint in Pennsylvania state court, pursuant to 42 Pa.C.S.A. §5103. That statute provides, in relevant part, that "if a matter is originally filed within the statute of limitations in the federal court, but is dismissed for lack of jurisdiction by the federal court, the litigant may then effect a transfer of the action to state court...[and] the state court will treat the matter as if originally filed in the state court..." *See also*, 28 U.S.C. §1367(d).

The Third Circuit's opinion was devoted entirely to the jurisdictional issue. The panel majority correctly noted that Brown's challenge to subject matter jurisdiction was twofold, in that he "claimed that Spectacor manipulated the payroll tax claim as a contrivance to manufacture the amount in controversy needed for diversity jurisdiction and that Spectacor owed him more than he owed it" (A 8). However, the Third Circuit majority affirmed the judgment of the district court, finding that it did have subject matter jurisdiction. In a marked departure from the well-settled authority of this Court and the reasoned decisions of other courts of appeal, not to mention the clear language of Fed.R.Civ.P. 12, the Third Circuit held that:

> [W]here, as here, a defendant elects not to file a motion to dismiss for lack of jurisdiction, but answers a complaint by asserting a compulsory counterclaim, the amount of that counterclaim may be considered by the court in determining if the amount in controversy exceeds the statutory requirement for diversity jurisdiction.

(A 8-9). Hence, although Brown objected timely to subject matter jurisdiction in his answer to the complaint and sought dismissal of the complaint for lack of jurisdiction in his subsequent Rule 11 motion (filed after he learned of the "set-off" Spectacor helped itself to), the Third Circuit ruled that since Brown's compulsory counterclaim itself sought damages that exceeded $50,000, the counterclaim in effect "rescued" Spectacor's complaint from jurisdictional attack (A 8-9). Since the Third Circuit focused only on the counterclaim, it said it did not have to reach the "issue of whether the payroll taxes can be considered in calculating the amount in controversy" (A 9). Presumably for the same reason, the Third Circuit also did not decide the separate but related issue of whether Spectacor had no claim for any damages when it sued Brown (A 19). The panel majority suggested, however, that it would have found that jurisdiction was lacking had Brown filed a motion to dismiss the complaint under Fed.R.Civ.P. 12(b), rather than exercising his Rule 12(b) option of raising lack of jurisdiction in his answer and filing a simultaneous counterclaim (A 8-9, 19).[7]

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[7] Since Brown elected the option of filing an answer which challenged the district court's jurisdiction, he was required to file, simultaneously with his answer, his compulsory counterclaim.

In his dissenting opinion, Judge Wellford stated that even if a compulsory counterclaim, standing alone, exceeds the jurisdictional amount in controversy, it should not be permitted to "save" a plaintiff's complaint which does not in good faith assert a claim for damages that clears the jurisdictional threshold (A 24-30). Judge Wellford reasoned that under the controlling authority, the presence or absence of diversity jurisdiction is to be determined from the standpoint of *the plaintiff's complaint*, especially in a case such as this where the defendant-counterclaimant raises the defense of lack of jurisdiction in his answer (A 24-30). Judge Wellford noted that since there was "a serious question" as to whether Spectacor had a good faith basis for bringing an action against Brown in federal court, and the district court failed to decide the jurisdictional issue even though it was raised by Brown, the appropriate remedy was to remand the case to the district court "for a thorough consideration of the jurisdictional issue" (A 29-30).

REASONS FOR GRANTING THE WRIT

I. The Majority Opinion of the Third Circuit, Which Relates to an Important Federal Jurisdictional Question, Conflicts With Relevant Decisions of This Court

As the Third Circuit dissent noted, "[f]ederal courts are courts of limited jurisdiction... [which] should strictly construe jurisdictional requirements" (A 29). *See also*, *Page v. Schweiker*, 786 F.2d 150, 153 (3d Cir. 1986). In keeping with this well-settled principle, this Court in the landmark case of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), established the general rule that whether the amount in controversy for diversity jurisdiction is satisfied is

to be determined from the good faith allegations of *the plaintiff's complaint*. *Id.* at 288. As this Court in *St. Paul* stated:

> [T]he sum claimed by *the plaintiff* controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal...But if, from the face of the pleadings, it is apparent, to a legal certainty, that *the plaintiff* cannot recover *the amount claimed* or if, from the proofs, the court is satisfied to a like certainty that *the plaintiff* never was entitled to recover *that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction*, the suit will be dismissed. (Emphasis added).

Id. at 288-89. *Accord, State Farm Mut Auto. Ins. Co. v. Powell*, 87 F.3d 93,96 (3d Cir. 1996). Furthermore, this Court in *St. Paul* declared that the plaintiff's good faith in choosing the federal forum is "open to challenge" either by resort to the face of the complaint or by the facts disclosed at trial, and that:

> [I]f from either source it is clear that [the plaintiff's] claim never could have amounted to the sum necessary to give jurisdiction, there is no injustice in dismissing the suit.

303 U.S. at 290.

In a more recent decision, this Court reaffirmed the validity of *St. Paul* when it ruled that a federal court's jurisdiction depends upon "the facts as they exist when the

complaint is filed". *Newman Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). *Accord, Powell, supra*, 87 F.3d at 97 (jurisdiction must be assessed based upon "factual reality" at time of filing complaint). Accordingly, under the controlling authority of this Court, it was Spectacor's complaint against Brown – and not Brown's counterclaim – that should have controlled the jurisdictional issue.

To further illustrate this point, this Court has also ruled that if it appears that the plaintiff has magnified or misrepresented his claim for damages just to get into federal court, the case should be dismissed for lack of jurisdiction. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903). In addition, this Court has established a rule (developed in the context of federal question jurisdiction) that a plaintiff may not create jurisdiction by anticipating defenses that a defendant might raise, but instead, must allege proper jurisdictional grounds in his complaint. *See, e.g., Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Taylor v. Anderson*, 234 U.S. 74 (1914); *First National Bank of Canton, Pa. v. Williams*, 252 U.S. 504 (1920). For these reasons, and under the time-honored teachings of this Court in *St. Paul, supra*, a federal court should look *only* to the plaintiff's complaint -- not to a counterclaim -- to determine whether jurisdiction exists. This is commonly known as the "plaintiff-viewpoint rule", as adopted by this Court in *St. Paul*, "under which jurisdiction is determined on the basis of what *the plaintiff* claims". *Motorists Mutual Ins. Co. v. Simpson*, 404 F.2d 511, 514 (7th Cir. 1969) (emphasis added). *See also*, Wright, Miller and Cooper, *Federal Practice and Procedure*, Vol. 13 §3608, Vol. 14A §3702 (whether federal jurisdiction exists is determined at time of filing action, not after responsive pleading is filed, and party seeking to invoke federal jurisdiction, once challenged, "has the burden of proving its existence").

The Third Circuit majority's ruling in this case that the amount of Spectacor's claim against Brown (or even if Spectacor had no claim at all) is irrelevant simply because Brown asserted a compulsory counterclaim which sought damages in excess of $50,000, directly conflicts with the controlling authority of this Court. The Third Circuit majority's holding actually eviscerates the principle announced in *St. Paul* that the jurisdictional amount in controversy is to be determined *solely* from the allegations of *the plaintiff's complaint*, and that *those* allegations must satisfy a "good faith" test. Indeed, the Third Circuit majority's rule announced in this case is nothing short of a repudiation of *St. Paul* because under this new rule, the time-honored "good faith" test for filing a complaint is no longer to be applied to complaints filed in the Third Circuit. Rather, a party who knows it does not have a claim that satisfies the jurisdictional amount in controversy can nevertheless compel the litigation in federal court if, like Spectacor, it wants to force the *real* plaintiff (in this case Brown) into federal as opposed to state court, by filing a preemptive "strike suit". Furthermore, under the Third Circuit's new rule, which ignores the well-established precedent established by this Court, district courts in the Third Circuit will have subject matter jurisdiction over sham claims even where the defendant strictly follows Rule 12(b) by challenging jurisdiction in his answer. The Third Circuit has thus established a brand new, hypertechnical "counterclaimant-viewpoint" rule under which the plaintiff's allegations – even if made in bad faith or for the purpose of manufacturing federal jurisdiction – are irrelevant. Furthermore, in the Third Circuit, a plaintiff is now invited to make up or magnify a claim to create the appearance of diversity jurisdiction, and it can then avoid the imposition of Rule 11 sanctions and

dismissal of the complaint even when it is caught, and the defendant objects to jurisdiction.[8]

Because the Third Circuit has decided an important federal question – whether a compulsory counterclaim that exceeds the jurisdictional amount in controversy can "save" a complaint that does not in good faith satisfy the amount in controversy, even where the defendant has objected to jurisdiction – in a way that conflicts with relevant decisions of this Court, this petition should be granted.[9]

II. The Ruling of the Third Circuit in This Case is in Direct Contravention of the Federal Rules of Civil Procedure. As a Result, the Exercise of This Court's Supervisory Power is Called For

To review, the Third Circuit majority rested its ruling on the notion that where a defendant opts not to file a Rule 12(b) motion to dismiss raising lack of jurisdiction, but instead objects to jurisdiction in his answer and simultaneously files a compulsory counterclaim, the amount of the counterclaim may be considered in determining whether the amount in controversy exceeds the statutory

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The Third Circuit panel majority noted that Brown moved for sanctions under Rule 11 after Spectacor conceded it owed Brown more than he owed it. The court, however, stated that "that does not alter our analysis" (A 19).

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Both the Third Circuit majority and dissent found that this Court's decision in *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348 (1961), offers no precedential value for this issue (A 21-23, 29). The majority did not rely upon *Horton*, and the dissent noted that there was "no persuasive basis for considering *Horton* as authority in this case".

minimum – even where the plaintiff's claim is a sham or does not meet the "good faith" test for establishing diversity jurisdiction. This ruling not only conflicts with controlling precedent of this Court, but it ignores Fed.R.Civ.P. 12(b), which by its express terms gives a defendant "the option" of raising lack of subject matter jurisdiction *either* in the answer *or* in a motion to dismiss. *Accord, McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); Wright Miller and Cooper, *Federal Practice and Procedure*, Vol. 14, §3706 ("Defendant can object to the court's jurisdiction over the original claim in the answer and plead the counterclaim in the alternative"). One reason why Brown did not file a motion to dismiss was that he did not become aware that Spectacor's entire claim was a sham until discovery was taken.

In any event, since Brown challenged jurisdiction in his answer, and thereby followed the provisions of Rule 12(b), it is immaterial that he chose not to file a motion to dismiss. The district court was still obliged to, but never did, address Brown's jurisdictional objection. As Fed.R.Civ.P. 12(h)(3) states:

> Whenever it appears *by suggestion of the parties or otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. (Emphasis added).

Accordingly, the Third Circuit majority disregarded the Federal Rules of Civil Procedure when it concluded that the amount sought in a counterclaim "counts" toward the amount in controversy if the defendant objects to jurisdiction *in his answer*, but *not* when he files a motion to dismiss (even if such a motion is subsequently denied by the court). Brown should not have been punished for complying with Rule 12(b). Because he objected to subject matter jurisdiction in his answer, he should not have been found to have "waived"

his right to challenge jurisdiction -- especially since the district court never considered his jurisdictional challenge , as it was obliged to under Rule 12(h)(3).[10]

III. The Third Circuit's Decision Conflicts With the Decisions of Other Courts of Appeal on This Same Important Jurisdictional Issue

The cases from other circuits which the Third Circuit majority purported to rely upon in support of its ruling actually stand for a contrary proposition. Those cases established a general rule that where the defendant *objects* to federal jurisdiction *and* files a counterclaim that exceeds the amount in controversy, the counterclaim cannot "rescue" a complaint that does not in and of itself satisfy the amount in controversy, but where the defendant does *not* object to jurisdiction and files a counterclaim, the court can exercise jurisdiction even if the complaint does *not* meet the jurisdictional threshold. Since Brown *did* object to subject matter jurisdiction in his answer (and again in his Rule 11 motion), the Third Circuit's ruling that his counterclaim was sufficient to bring the entire case within the district court's jurisdiction even if Spectacor's complaint was jurisdictionally

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10 The Third Circuit majority's rationale for allowing the amount of Brown's counterclaim to count toward the amount in controversy is plainly illogical. What if Brown had filed a motion to dismiss under Rule 12(b) and the district court denied that motion? Brown would have then been forced to file his compulsory counterclaim anyway. Would the rule then be that the counterclaim would *not* count in determining whether jurisdiction exists? It is presumably for these reasons that the Third Circuit dissent disagreed with the majority view that "Brown should lose the jurisdictional argument because he did not file a motion to dismiss, when he objected to the court's jurisdiction affirmatively in his answer" (A 29).

deficient, is at odds and in direct conflict with the decisions of other courts of appeal. As a result, there is now an irreconcilable conflict among the circuit courts with regard to this important jurisdictional issue. For this reason as well, this petition should be granted.

A review of the cases cited by the Third Circuit underscores the existence of this conflict. In *Roberts Mining Co. v. Schrader*, 95 F.2d 522 (9th Cir. 1938), the plaintiff's complaint failed to allege *any* jurisdictional facts, and the defendant filed an answer and counterclaim *and never objected* to jurisdiction. *Id.* at 523-24. The counterclaim requested damages that exceeded the amount in controversy, and the Ninth Circuit determined that the district court had jurisdiction. Similarly, in *Fenton v. Freedman*, 748 F.2d 1358 (9th Cir. 1984), the Ninth Circuit, relying upon its earlier decision in *Roberts Mining*, found that a compulsory counterclaim that by itself exceeded the jurisdictional amount in controversy was adequate to bring the entire case within the district court's jurisdiction, even where the plaintiff's claim was undoubtedly for less than the jurisdictional amount. The basis for the Ninth Circuit's ruling was that the defendant *did not object* to the district court's jurisdiction at any time prior to filing an appeal. *Id.* at 1359. Although the Third Circuit majority in this case *purported* to rely upon *Roberts Mining* and *Fenton*, those cases are easily distinguishable and stand for the opposite proposition to the Third Circuit's rule for the simple reason that in this case, Brown *did* object to jurisdiction in his answer to the complaint, and again in his Rule 11 motion. Unlike the plaintiffs in *Roberts Mining* and *Fenton*, Brown followed the rules when he objected, in a timely manner, to jurisdiction. Under *Roberts Mining* and *Fenton*, Brown's timely objection to jurisdiction would have meant that his counterclaim would not have "counted" toward the amount in controversy.

The Third Circuit's decision in this case is also in conflict with the Seventh Circuit's decision in *Motorists Mutual Ins. Co. v. Simpson*, 404 F.2d 511 (7th Cir. 1969) - although the Third Circuit majority purported to rely upon *Simpson* as well. In *Simpson*, the court embraced the rule "under which jurisdiction is determined on the basis of what the plaintiff claims", and *not* on the basis of what is alleged in a compulsory counterclaim. *Id.* at 514. The *Simpson* court went on the hold, in language which cannot be reconciled with the Third Circuit's holding in this case:

> [W]e believe that a compulsory counterclaim should not be held to give rise to federal jurisdiction where the defendant-counterclaimant *has objected from the beginning to the federal court's assumption of jurisdiction over the plaintiff's main action on the ground that the amount in controversy in that action is insufficient* and additionally, after its jurisdictional objection is overruled, files a compulsory counterclaim even though the amount therein exceeds [the amount in controversy]. (Emphasis added).

Id. at 514.

The Seventh Circuit in *Simpson* stated that the corollary proposition also holds true, *i.e.*, where a defendant files a compulsory counterclaim for more than the requisite jurisdictional amount "without initial objection to federal court jurisdiction over a main action that lacks the requisite amount in controversy", it can reasonably be inferred that the defendant-counterclaimant has consented to jurisdiction. *Ibid.* The *Simpson* court noted, however, that in the case before it, "continuous objection to federal jurisdiction was made by the defendant". *Id* at 515. Under those circumstances, according

to *Simpson*, since the defendant did not originally choose the federal forum, the option should be *his* as to whether or not the action should be maintained in federal court. *Ibid.* Accordingly, the *Simpson* court concluded that it was without jurisdiction to proceed unless *the plaintiff's claim* exceeded the requisite jurisdictional amount. The Third Circuit's ruling in this case conflicts with *Simpson* because Brown, like the defendant-counterclaimant in *Simpson*, objected from the outset to federal jurisdiction on the ground that the plaintiff's complaint did not meet the amount in controversy requirement. Under the rationale of *Simpson*, the fact that Brown filed a compulsory counterclaim along with his challenge to jurisdiction should not have led to the conclusion that Brown consented to jurisdiction, or waived his objection to jurisdiction. To the contrary, under the rule set forth in *Simpson*, the Third Circuit should have looked *only* to Spectacor's complaint to determine if there was jurisdiction.[11]

Accordingly, this petition should be granted for the additional reason that the Third Circuit's majority's decision conflicts with decisions of the Seventh and Ninth Circuits on this important federal jurisdictional issue.

CONCLUSION

For all of the foregoing reasons, this petition should be granted.

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[11] In *Simpson*, the Seventh Circuit cited this Court's holding in *St. Paul, supra*, for "[t]he rule that the amount in controversy should be determined from the standpoint of the plaintiff..." 404 F.2d at 514 & n.3.

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Gary Green
(Counsel of Record)
Robert A. Davitch
Sidkoff, Pincus & Green,P.C.
2700 Aramark Tower
1101 Market Street
Philadelphia, PA 19107
(215) 574-0600

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